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In The

Supreme Court of the United States

October Term, 1983

S & S MACHINERY CO.,

Respondent,

vs.

MASINEXPORTIMPORT and THE ROMANIAN BANK FOR FOREIGN TRADE,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

By this petition for a writ of certiorari, defendants-petitioners ("petitioners"), which are instrumentalities of the Socialist Republic of Romania within the meaning of the Foreign Sovereign Immunities Act (28 U.S.C.A. §§1602 et seq.), seek the review by this Court of the opinion and order of the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), dated April 6, 1984, affirming the opinion and order of the United States District Court for the Southern District of New York (the "District Court"), dated November 14, 1983, denying petitioners' renewed motion under Rule 60(b) of the Federal Rules of Civil Procedure (renewing a prior motion made by petitioners previously denied by the District Court by an opinion and order dated December 7, 1982).

to stay this action and to compel arbitration of the matters in dispute, pursuant to the provisions of the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The Convention") to which the United States of America and the Socialist Republic of Romania are parties, and the Federal Arbitration Act ("The Act") enforcing that Convention in the United States of America (9 U.S.C.A. §§201 et seq., and §§1 et seq.), as well as the strong Federal policy favoring the arbitration of international disputes such as this, established by the Convention, The Act and the applicable decisions of this Court.

On this petition, two questions are presented for consideration by this Court pertinent to its determination as to whether or not the review sought by petitioners should be granted.

1. Did the District Court err (as petitioners contend) in so denying, purportedly relying on its discretion in connection with a Rule 60(b) motion, petitioners renewed motion to stay this action and to compel arbitration, thereby denying to petitioners that relief, and even further denying to petitioners at least a trial as to their entitlement to such relief, under The Convention, The Act and also such strong Federal Policy?

2. Did the Court of Appeals also err (as petitioners contend) in so affirming the District Court's denial of the aforementioned relief to petitioners, on the ground that it was properly within that Court's discretion in connection with a Rule 60(b) motion to deny petitioners such relief?

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OPINIONS BELOW

The opinion of the Court of Appeals which petitioners seek to have this Court review, a copy of which is contained within the Appendix to this petition at pages 1a-5a, is an unpublished opinion and is unreported. The opinion of the District Court which was indorsed on the back of petitioners' motion papers before the District Court, a copy

of which is contained within the Appendix at page 6a, is also unreported. The earlier opinion of the District Court on petitioners' prior motion to compel arbitration, which was renewed by petitioners on their aforementioned motion and so denied by the District Court as not having been made within a reasonable time, a copy of which is contained within the Appendix at pages 7a-27a, is likewise unreported.

JURISDICTION

The opinion of the Court of Appeals was entered on April 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The pertinent provisions of the statutory and the treaty provisions involved are set forth in the Appendix at pages 35a-46a.

STATEMENT OF THE CASE

As has already been established in this action, petitioners are agencies or instrumentalities of the Government of the Socialist Republic of Romania ("Romania") within the meaning of 28 U.S.C.A. §1603, and, as such, are immune from pre-judgment attachment, or equivalent forms of that provisional remedy, under 28 U.S.C.A. §1609. S&S Machinery Co. v. Masinexportimport, etc., et al., 706 F.2d 411 (2d Cir. 1983), cert. den., ___ U.S. ___, 104 S. Ct. 161 (1983).[1]

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1. Petitioner Masinexportimport ("Masinexportimport ("Masin") is a foreign trade (Cont'd)

The controversy in this action arises out of a number of written agreements entered into between Masin and American Edelstaal, Inc. ("Edel") in or about 1977 (the "Masin-Edel Contract"). Under the Masin-Edel Contract, Edel became the exclusive distributor for re-sale in the U.S. of certain machine tools manufactured by three factories in Romania and sold in export abroad by Masin. The Masin-Edel Contract contains an arbitration clause which provides, in pertinent part, as

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(Cont'd)

company wholly-owned by the Romania Government and headquartered in Bucharest, Romania. Petitioner, The Romania Bank for Foreign Trade ("Romanian Bank"), is an organ of the Romanian Bank and also headquartered in Bucharest, Romania. Neither Masin nor Romanian Bank maintain offices in the United States of America (the "U.S.") for the doing of business here. Romanian Bank further simply acted as a collecting bank for Masin in connection with the transactions hereafter described.

follows:

> In the event a dispute arises regarding this agreement...either party...will have a right to apply to the International Chamber of Commerce in Paris to settle the dispute .... The arbitration before the International Chamber of Commerce will take place in Paris.

The purpose such clause was intended to serve is obvious. It provides for a neutral body in a mutually convenient and neutral forum, the International Chamber of Commerce in Paris, France (the "I.C.C."), to resolve any disputes "regarding" the Masin-Edel Contract.[2]

---

2. Arbitration provisions such as this, are invariably insisted upon by all Romanian companies in their agreements with U.S. companies where the latter will not agree to any other forum for the resolution of such disputes through arbitration (such as, e.g., the Romanian Arbitration Commission of the Chamber of Commerce and Industry), as the U.S. Commerce Department itself has

(Cont'd)

From 1977 through 1980, Masin's relationship with Edel under the Masin-Edel Contract proceeded smoothly and without any major problems between the parties, and Masin sold many millions of dollars of these machine tools in export to Edel. Commencing in 1980, however, Edel began to experience financial difficulties, for a number of reasons, and eventually became unable to fund its purchase orders for machine tools by way of letters of credit pursuant to the Masin-Edel Contract. In particular, by the summer of 1980, Edel failed to make provision for payment for a quantity of machine tools previously ordered by Edel from Masin in January of 1980 and covered by Edel purchase orders (the "Edel Purchase Orders"). Significantly, the

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(Cont'd)

published. See, "Overseas Business Reports, Trading and Investing in Romania". (OBR 73-76 Aug. 1973).

Edel Purchase Orders covered all but four (4) of the 138 machine tools involved in this action.

Masin thus had no alternative except to reluctantly cancel the exclusive distributorship that Edel had in the U.S. under the Masin-Edel Contract, effective as of September 15, 1980, and Masin so notified Edel by notification dated September 6, 1980.[3]

In response to such notification, Edel, by telex dated October 2, 1980, advised Masin that

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3. Such notification of cancellation, however, was subsequently rescinded, and Edel's exclusive distributorship of these machine tools in the U.S., was also expressly reaffirmed and reinstated, on July 31, 1981, based on financial and business arrangements entered into between respondent S & S Machinery Co. ("S & S") and Masin in January, 1981 as represented to Masin by Edel.

Edel was then negotiating with S & S to provide Edel with the ability to fund Edel's purchases of machine tools under the Masin-Edel Contract. Edel also specifically requested therein Masin's reaffirmance of Edel's exclusive distributorship under the Masin-Edel Contract, upon Edel's fulfillment of its obligations to Masin in this regard, in order "... to avoid delays in ... [Edel's] conclusion of [the] negotiations mentioned [with S & S]." (Clarification added).[4]

By telex dated January 7, 1981, Edel thereafter advised Masin that Edel had "... con-

4. As already noted, see footnote 3, supra, Masin did, in fact, reaffirm and reinstate Edel's exclusive distributorship in the U.S., as above-requested by Edel, based on the financial and business arrangements so concluded between Edel and S & S as represented to Masin by Edel.

cluded a financial and business arrangement with ... [S & S] regarding deliveries of ..." these machine tools to Edel. (Emphasis and clarification added).

When asked by Masin for details as to the aforementioned "financial and business arrangement" concluded between Edel and S & S, Edel responded by telex on January 27, 1981, that:

> the intercompany transactions between s & s and edelstaal [Edel] are complicated matters involving many details, too numerous for telex discussions. Of importance to you [Masin], however, are the following:
>
> 1. all purchases will be made by and [for] edelstaal.
>
> 2. we [Edel] are financially in a position to meet any obligation we enter into.
>
> * * *

(Emphasis and clarification added).

Subsequently, by telex dated May 17, 1981, Edel further notified Masin as follows:

> as promised to you [masin] in n.y. i [Edel, per its president] am pleased
>
> to advise that three 1/c's[5] totalling us dlrs 821,602. (as per the advanced copies provided to you [Masin] in

5. All three of the above-mentioned "1/c's", or letters of credit, were opened by S & S at the Bankers Trust Company in New York in Masin's favor and each expressly referred to the fact that it had been opened "as per" the Edel Purchase Orders. As for any machine tools covered by the Edel Purchase Orders which were not covered by these three 1/c's, and by a fourth 1/c also opened by S & S in Masin's favor covering additional machine tools covered by the Edel Purchase Orders, it was understood and agreed between Masin and Edel that such machine tools would later be covered either by way of 1/c's issued by Edel's bank, the First National State Bank of New Jersey ("N.J. Bank"), or banker's acceptances by N.J. Bank, or by deliveries on consignment secured by warehouse receipts held by N.J. Bank as against receipt of payment, or by way of additional financing provided by S & S.

> n.y.) have been opened in accordance with edelstaal purchase orders [the Edel Purchase Orders] ....

(Clarification and emphasis added).

In order that there would be no misunderstanding whatsoever between Masin and Edel, or Masin and S & S, respectively, as to the fact that the terms and conditions of the Masin-Edel Contract controlled with regard to Masin's sale of the machine tools covered by the aforementioned "l/c's" opened by S & S in Masin's favor, Masin telexed Edel as follows on May 29, 1981:

> thank you [Edel] for the letters of credit received, having in view that they were opened by s and s, pls [please] confirm [to] us [Masin] by return, that they are for american edelstaal account as per edelstaal orders, only due to a financial agre[e]ment [between Edel and S & S] l/c's

> were opened by S & S but goods [the machine tools covered by said l/c's] will be taken over by edelstaal according to our contract [the Masin-Edel Contract].

(Emphasis and Clarification added).

In response to the above-quoted telex, Edel, by telex dated as of May 28, 1981, but expressly referring to said telex by number, provided such express confirmation as requested by Masin, and also expressly represented to Masin, and also expressly represented to Masin, as follows:

> [Edel] am pleased to confirm that the three l/cs = 60379, 60381 which were opened via bankers trust company of new york were opened upon our [Edel's] behalf for edelstaal lathes and drills as per edelstaal orders and that all of the machines covered by these l/cs are for the account of

> <u>american edelstaal, inc. in accordance with our contract with masinexportimport.</u>

(Clarification and emphasis added).

Based on the foregoing representations which Edel made to Masin, and upon which Masin reasonably relied, Masin supplied the machine tools involved in this action.

When the economic recession that the world unfortunately has been in impacted in the U.S. in late 1981, customer demand for these machine tools in the U.S. rapidly declined. Edel and S & S thus found themselves in possession of machine tools purchased from Masin, and for which they had to pay, under the aforementioned letters of credit and bankers acceptances which S & S and Edel had provided to fund such purchases pursuant to the financial and business

arrangements concluded between themselves, but for which machinery customer demand was declining.

When Edel sought, but failed to obtain from Masin, a six (6) months' extension requested by Edel on the payment of approximately $300,000 shortly falling due on bankers acceptances at N.J. Bank,[6] Edel, in October 1981, then purportedly instituted the first of two (2) litigations in the New Jersey State Courts (the "N.J. Actions") against

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6. It should be noted that Masin would have granted Edel's request for the above-mentioned extension, but for the fact that Edel made such request so late that time did not exist for Masin to obtain approval of the same from the Romanian Governmental authorities to whom Masin is answerable and whose approval of its financial transactions abroad is required under Romanian law.

N.J. Bank, Masin and Romanian Bank. In that action, Edel obtained ex parte orders wrongfully restraining N.J. Bank from paying and also from honoring, and Masin and Romanian Bank from collecting, approximately $500,000 worth of such letters of credit.

In approximately January 1982, Masin, by counsel then hastily engaged, filed a petition against Edel in the District Court to compel arbitration of the matters in dispute between Edel and Masin in the first of said N.J. Actions and to vacate the restraints so obtained by Edel. However, on motion by Edel, the District Court (per Judge Owen) was "constrained" to dismiss Masin's petition for lack of venue, by order dated July 27, 1982, based on 9 U.S.C.A. §205, even though, as found by the District

Court, the Masin-Edel Contract, pursuant to 9 U.S.C.A. §202, is "... subject to the terms of the [United Nations] Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('The Convention')." (Emphasis and clarification added).[7] See 9 U.S.C.A. §§201 et seq., which enforce -- The Convention (to which the U.S. and Romania are parties) in the U.S.

While Masin's aforementioned petition against Edel was still pending before the District Court, S & S purportedly instituted this action in a New York State Court and obtained an ex parte order from that Court on

7. A copy of the District Court's July 27, 1982 order, which opinion is also unreported, is set forth in the Appendix to this Petition at pages 28a-34a.

July 15, 1982 wrongfully attaching over $1,000,000 of petitioner's assets at the Bankers Trust Company. While that petition was also still pending, and but 12 days after S & S purportedly instituted this action, Edel then purportedly instituted the second of its N.J. Actions against N.J. Bank, Masin and Romanian Bank, and also wrongfully obtained in that action, ex parte, an order of attachment which was levied upon certain warehouse receipts held by N.J. Bank in Masin's favor covering machinery sold to Edel on consignment.

The gravamen of S & S' complaint in this action (as well as of Edel's complaints in such N.J. Actions) is that the machinery purchased from Masin allegedly "without exception,

is wholly defective, unuseable, unsafe and without value," and by reason of which S & S (like Edel) seeks rescission of its obligation to pay for this machinery together with damages allegedly incurred.[8] The collusive nature of these suits is thus evident on the face of

8. S & S' allegations are belied by its own pre-trial list filed in response to the order of the U.S. Magistrate to whom the District Court, in December 1982, later assigned supervision of discovery in this action. That list shows that most of the machinery involved herein are at S & S' warehouse locations and, in all unlikelihood, never even uncrated, and that of the 30 machine tools listed as having been sold, only one (1) of those machines has been the subject of a litigation with the ultimate purchaser. Moreover, of those 30 machine tools sold, all but five (5) are listed as having been sold by Edel to the ultimate purchasers, thus, showing that Edel was, in fact, the actual purchaser of this machinery as represented to Masin by Edel.

their pleadings, and by the identical methods of service S & S and Edel each employed in purportedly instituting these actions, i.e., by apparently mailing copies of their English language summonses and complaints, as well as their moving papers for such provisional relief, etc., to petitioners in Romania, and by delivering copies of same to a doorman at the Romanian National Tourist Office in New York City. As a consequence of such methods of service, petitioners thus had no notice as to Edel's and S & S' purported commencement of these three (3) obviously related actions, until long after Edel and S & S had already obtained such ex parte provisional relief.

By order dated July 29, 1982, the District Court (per Judge Knapp) granted petitioners'

motion dated July 27, 1982 for removal of this action from the New York State Court on the grounds of diversity of citizenship, but continued, with certain modifications, the attachment order entered by that state court. On August 27, 1982, petitioners also removed Edel's N.J. Actions from that state's courts to the U.S. District Court for the District of New Jersey (the "N.J. District Court") on identical grounds.

On August 27, 1982, petitioners, by then newly engaged counsel, moved in the N.J. District Court, to vacate the restraints and attachments obtained by Edel in its N.J. Actions as wrongful under 28 U.S.C.A. §1609; and to dismiss both actions for lack of in personam jurisdiction, or, in the alternative, to stay

such actions and to compel arbitration based on the arbitration clause in the Masin-Edel Contract pursuant to The Convention, 9 U.S.C.A. §§201 et seq., and the Federal Arbitration Act of 1925, 9 U.S.C.A. §§1 et seq. By motion dated September 13, 1982, petitioners, by such newly engaged counsel, also moved before the District Court in this action for the identical relief and on the identical grounds.[9]

S & S' institution of this action in July 1982, could not have come at a worse possible

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9. Oral argument by counsel was heard by the District Court on the above motion in this action on October 22, 1982, four (4) days after oral argument by counsel was heard by the N.J. District Court on petitioners' identical motion for such relief in Edel's N.J. Actions.

time for Masin.[10] All of Masin's files and records on its affairs with Edel and S & S were then in Romania. Masin then also had no representative in the U.S. with knowledge of the facts to meet with petitioner's counsel then also only newly-engaged. Masin further was then in the process of reorganization by the Romanian Government, which reorganization was not completed until well into the 1983 calendar year and entailed, in the interim, the replacement of Masin's general manager and chief legal counsel and many other changes in Masin's

10. As already shown, S & S institution of this action coincided in that month with both Edel's institution of its second N.J. Action and with the District Court's (per Judge Owen) dismissal of Masin's petition against Edel to compel arbitration of the matters in dispute in Edel's first N.J. Action.

key personnel with knowledge of the facts. Moreover, few in Masin's employ then (and now) read and write English fluently, which group of employees, in addition to being affected by Masin's internal reorganization, also were then involved in other matters. As a consequence, petitioner's counsel in this action, and in Edel's N.J. Actions, had only very limited information available to them respecting the matters involved in these actions and, in particular, respecting S & S' relationship with Edel, when petitioners' aforementioned motions were made.[11]

11. Such motions obviously had to be made in great haste because of the wrongful attachments S & S and Edel had already obtained, ex parte, affecting petitioner's assets, in order to protect petitioner's rights under 28 U.S.C.A. §§1602 et seq., the Foreign Sovereign Immunities Act of 1976.

It was thus mistakenly believed by petitioners' counsel when such motions were made,[12] and

12. Such mistaken belief was induced by petitioners' belief in the bona fides of S & S' own moving papers when this action was purportedly commenced and the subject attachment was obtained by S & S in July 1982, which moving papers copies of S & S purchase orders allegedly placed by S & S covering all of the machinery involved in this action. However, in June 1983, it was discovered that such belief was mistaken, based on the review made by Masin of its files and records in Romania after completion of its internal reorganization, and the information then communicated and demonstrated to petitioners' counsel by the delegation from Romania that Masin sent to New York to discuss the case with counsel in mid-June 1983. Indeed, as petitioners' counsel was then first advised by that delegation, Masin has no record of its ever having received any such purchase orders from S & S, except for but four (4) of the 138 machine tools involved in this action. This shocking information was then immediately brought to the District Court's attention by petitioners' July 1983 motion renewing their September 1982 motion to compel arbitration.

continuing until June 1983, that the course of business followed between the parties repecting the machinery involved in this action had been that: (1) Edel had ordered this machinery from Masin by the Edel purchase orders; (2) because of Edel's financial difficulties, resulting in the aforementioned financial and business arrangements concluded between Edel and S & S in January 1981 as represented by Edel to Masin, S & S had then re-ordered such machinery (incorporating by express reference therein the Edel Purchase Orders), putting up S & S' own letters of credit therefore, and (3) Masin then shipped the machinery to S & S which, in turn, resold them to Edel pursuant to said arrangements between S & S and Edel. In short, it was petitioners' position on

their September 1982 motion in this action that S & S was bound by the arbitration clause contained in the Masin-Edel Contract, because S & S was merely an accommodation party for Edel. However, it was also petitioners' position on that motion that S & S was also bound by Edel's aforementioned representations to Masin to arbitrate the matters in dispute in this action because of petitioners' belief that S & S had, in fact, acquired ownership and/or control of Edel in January 1981, approximately five (5) months before Edel represented to Masin by telex, in response to Masin's request for such express written confirmation,that the subject machinery, even though covered by S & S' "l/c's," was to be supplied by Masin for Edel's "account ... in accordance with" the Masin-Edel Contract.

See pp. 11-12, supra.

S & S vigorously opposed petitioners' September 1982 motion in this action and, in particular, that branch of the motion seeking to compel arbitration of the matters in dispute in this action. In addition to denying its ownership and control of Edel when Edel made the aforementioned representations, and that the arbitration clause contained in the Masin-Edel Contract is binding on S & S, S & S also represented that Edel and S & S were, and are, entirely separate and distinct entities.[13]

13. S & S is a partnership, headquartered in Brooklyn, N.Y., comprised of at least two brothers, if not also a third brother (the "Srybnik Brothers"). Edel, on the other hand, is a close corporation. Neither S & S', nor Edel's, affairs and, in particular, the precise nature of their relationship inter se, is therefore a matter of public record. The final proof of (Cont'd)

By its decision and order dated December 7, 1982 (the "December 1982 Order") (Appendix 7a-27a), the District denied petitioners' September 1982 motion to dismiss this action as against Masin for lack of in personam jurisdiction.[14] The District Court further denied

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(Cont'd)

S & S' relationship with Edel, arising out of the financial and business arrangements concluded between them in January 1981, thus has at all times rested, since this action was commenced, exclusively within S & S' and Edel's control. All that petitioners' counsel therefore could show on petitioners' September 1982 motion (as well as later on petitioners' July 1983 renewal of that motion hereafter discussed) was what Edel and S & S represented to Masin respecting the nature of their relationship since January 1981, vis -- that S & S had then acquired control, if not also total ownership, of Edel, directly or indirectly.

14. Unlike Edel in the N.J. Actions, S & S, in an endeavor to cure its obviously defective service of process in this action, subse-

(Cont'd)

petitioners' motion, in the alternative, to stay this action and to compel arbitration,

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(Cont'd)

sequently effected or purported to effect service of process on petitioners in a variety of other manners -- including mailing copies of the summons and complaint, translated into the Romanian language, to petitioners in Romania, in compliance with 28 U.S.C.A. §1608 -- after petitioners made their September 1982 motion. The District Court, however, sustained jurisdiction as to Masin, finding that service of English language copies of the summons and complaint on the N.Y. Secretary of State based on N.Y.'s "long-arm" statute, N.Y.C.P.L.R. §§302(a)(1), and N.Y. B.C.L. §307 which designates such official as an agent for service of any corporation subject to personal jurisdiction in N.Y. The District further referred the issue as to whether or not personal jurisdiction exists as to Romanian Bank to the Magistrate for determination.

Edel, however, never attempted to cure its equally defective service and, on February 28, 1983, the N.J. DIstrict Court, after vacating Edel's attachments as wrongful under 28 U.S.C.A. §1609, dismissed both N.J. Actions for lack of personal jurisdiction.

based on the District Court's finding on the papers before it, and without a trial on the factually disputed issue in those papers as to S & S' obligation to arbitrate this matter, that S & S had contracted "anew" to buy the machinery contracted for by Edel under the Edel Purchase Orders and that no arbitration agreement thus existed between S & S and Masin. The District Court, however, vacated S & S' attachment as wrongful under 28 U.S.C.A. §1609.[15]

As evident on the face of its December

15. That aspect of the December 1982 Order which so vacated S & S' attachment, was unanimously affirmed on S & S' appeal therefrom by the Court of Appeals on April 26, 1983, and this Court denied S & S' petition for certiorari on October 3, 1983. S & S Machinery Co. v. Masinexportimport, etc., et al., 706 F.2d 411 (2d Cir. 1983), cert. den., __ U.S. __, 104 S. Ct. 161 (1983).

1982 Order, the predicates for the District Court's denial of petitioners' September 1982 motion to compel arbitration were: (1) the bona fides of S & S' alleged purchase orders with Masin for the Machinery in this action, and (2) S & S' denial of its ownership and control of Edel, directly or indirectly, when Edel represented to Masin in May 1981 that Masin's supply of machinery would be for Edel's account and in accordance with the Masin-Edel Contract even though S & S' had put up the letters of credit covering payment.

No cross-appeal was taken by petitioners from the District Court's denial of its September 1982 motion to stay this action and compel arbitration, even though the District Court's denial of such relief, on the factuall disputed papers before that Court, was

then (and now) believed to be in error,[16]

16. See 9 U.S.C. §§201, 202, 208 and 4; The Convention, Art. II, §1; The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 at 9 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506 at 519-520 (1974); Gateway Cole Co. v. Mineworkers, 414 U.S. 368 (1974); Becker Autoradio U.S.A. v. Becker Autoradio Werk GmbH, 585 F.2d 39, 44 (3rd Cir. 1974); and Hussey Metal Division v. Lectromelt Furnace Division, 471 F.2d 556 at 558 (3rd Cir. 1972), establishing a strong Federal policy favoring international arbitration, and holding that "any doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court can state with 'positive assurance' that this dispute was not to be arbitrated," supra, 471 F.2d at 558. See also, Morris v. Chesapeake & U.S.S. Co., 125 F.2d 62, 66 (S.D.N.Y. 1903), aff'd, 148 F. 11 (2d Cir.), cert.den. 208 U.S. 592 (1906); Hartford Financial Systems v. Florida Software Services, 550 F. Supp. 1079 (D.C. Maine 1982), appeal dismissed, 712 F.2d 724 (1st Cir. 1983); In re Atlantic Shipping Corp. v. Cheswick Flanders & Co., 463 F. Supp. 614 (S.D.N.Y. 1978); Interocean Shipping v. National Shipping & Trading, 462 F.2d 673 (2d Cir. 1972); Almacenes Fernandez (Cont'd)

because, under the rule previously adopted by the Court of Appeals in Standard Chlorine of Delaware v. Leonard, 384 F.2d 304 (2d Cir. 1967) and followed in Diematic Mfg. Corp. v. Packaging Industries Inc., 516 F.2d 975 (2d Cir. 1975), the December 1982 Order was not appealable in this respect. Significantly,

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v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945); McAllister Bros. v. A & S Transportation Co., 621 F.2d 519 (2d Cir. 1980), and Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., 663 F.2d 4 (2d Cir. 1981), holding that event third (non-singing) parties to written arbitration agreements may be held bound by the latter. And see, McAllister Bros. v. A & S Transportation Co., supra; Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., supra; A/S Custodia v. Lessin International, Inc., 503 F.2d 318 (2d Cir. 1974); Fisser v. International Bank, 282 F.2d 231, 235 (2d Cir. 1960), and Great American Trading Company v. I.C.P. Cocoa, Inc., 629 F.2d 1282 (7th Cir. 1980), holding that where the existence of an arbitration agreement is factually disputed, the Court must hold a trial on that threshold issue pursuant to 9 U.S.C.A. §4, and that it is improper to determine tha issue on factually disputed papers.

the December 1982 Order was made more than two (2) months before this Court's decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., __ U.S. __, 103 S. Ct. 927 (1983) in which, it is respectfully submitted, this Court subsequently resolved the "Serbonian Bog" referred to by the Court of Appeals in Diematic, supra, 516 F.2d at 978.[17]

17. Notwithstanding this Court's decision in Moses H. Cone Memorial Hospital, supra, such "Serbonian Bog" nonetheless apparently still exists. See, e.g., Hartford Financial Systems v. Florida Software Systems, supra, 712 F.2d 724-729. See also, Appendix at pp. 1a-5a. Consequently, Federal Courts of Appeals continue to hold that orders denying defendants' motions to stay actions pending in the Federal District Courts and to compel arbitration are not appealable where (as in this case) the action, before the fusion of law and equity, was one in equity. Incongruously, in independent proceedings commenced under 9 U.S.C.A. §4, the resulting orders are held appealable, however, see, Chatham Shipping v. Fertex Shipping, 352 F.2d 291 (2d Cir. 1965) and In Re N.V. Maatshappij Voor In-

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Accordingly, and as suggested by the Court of Appeals in Diematic, supra at 980, petitioners interposed as defenses in their answers to S & S' complaint that the matters in dispute in this action are subject to arbitration, it being petitioners' intent to renew their motion to compel arbitration (as petitioners did on their July 1983 renewed motion hereafter discussed) upon the basis of further evidence adduced establishing petitioners' entitlement to such relief. Such intent, moreover, was clearly disclosed to the District Court by petitioners' answers; to the Court of Appeals in petitioners' brief

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dustriale Waarden & A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976). See also, Aacon Auto Transport, Inc. v. Ninfo, 490 F.2d 83 (2d Cir. 1974).

in opposition to S & S' appeal from the other aspects of the District Court's December 1982 Order, and to the Magistrate to whom discovery has been assigned in this case in connection with each and every response by petitioners to the latter's pre-trial discovery orders herein. At each and every stage of the proceedings to date in this action, petitioners have continually asserted their rights to arbitration of the matters in dispute herein and demanded that this action be stayed and arbitration compelled. Petitioners, thus, have in no way waived such right. See, Great American Trading v. I.C.P. Cocoa, Inc., supra, 629 F.2d at 1287-1289, citing this Court's decision in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

On discoverying, in mid-June 1983, that Masin has no record of its ever having received

S & S purchase orders for the machinery in this action, petitioners, by motion dated July 11, 1983, renewed its September 1982 motion to compel arbitration. That motion (the "Renewed Motion") was supported by petitioners' counsel's affirmation setting forth the basis for the latter's mistaken belief theretofore that Masin had received such S & S purchase orders, and by at least four (4) affidavits from the delegation Masin had then sent from Romania to the U.S., and by the then Assistant Economic Counsellor for the Romanian Government in New York, all attesting to the foregoing facts. In addition, the Renewed Motion was supported by documents then transported from Romania to the U.S., and by further documents then also recently obtained by recourse to another then pending litigation in another state to which

petitioners were not parties, all bearing upon, and demonstrating, the closeness of S & S' relationship with Edel.

At a pre-trial conference with the District Court on July 12, 1983, S & S (by its counsel) represented that S & S possessed "numerous telexes" between S & S and Masin contemporaneous with S & S' alleged ordering of this machiner, allegedly proving that Masin did, in fact, receive these disputed S & S purchase orders[18], and asserted that

18. The sole corroboration of S & S' above representations subsequently produced by S & S in October 1983 in opposition to petitioners' Renewed Motion, consisted of a solitary telex purportedly sent to Masin by S & S on January 8, 1982, after Edel had commenced its first N.J. Action, and after Masin had petitioned the District Court for arbitration of the matters therein in dispute. In terms of S & S' representations, such telex, therefore, was not contemporaneous with S & S' alleged ordering of this machinery and, moreover, by its terms, that telex also was at best equivocal and referred specifically to the serial number of a

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Masin, therefore, was in bad faith in making the Renewed Motion. S & S thus contended at that conference that the District Court should not even entertain the Renewed Motion unless Masin first posted security for costs. The District Court, acting on S & S' representations and application, thus directed that Masin had to provide a bond or other collateral in the amount of $5,000 as a precondition to Masin's proceeding with the Renewed Motion and S & S' being required to respond thereto. As also indicated by the District Court at such conference, the Renewed Motion to compel arbitration, even after such security had been posted, could not be heard by the District Court in any

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machine tool covered by one of the Edel Purchase Orders with which a mechanical problem then purportedly existed. Also, as shown by Masin's reply affidavit, Masin had no record of its receipt at that telex either.

event, due to its heavy calendar, until October 1983.

Upon obtaining Romanian Governmental approval, Masin subsequently posted such security by September 1983, thereby fulfilling the pre-condition so set by the District Court, on S & S' application to petitioners' Renewed Motion, and oral argument was set by the District Court for October 28, 1983 and heard on that date.

As previously stated, the facts respecting S & S' relationship with Edel, and S & S' control, if not total ownership also, of Edel since January 1981 have at all times been (and still are) exclusively in S & S' and Edel's possession. S & S has also opposed (and still opposes) every effort by petitioners to require S & S to disclose the true facts in its possession respecting

that relationship.[19] Shortly before argument on the Renewed Motion, however, S & S belatedly furnished an affidavit, verified October 7, 1983, by one of the Srybnik Brothers, in response to a specific direction by the Magistrate on July 26, 1983, requiring the disclosure of that partnership's (S & S'), and its partners' (the Srybnik Brothers'), relationship, directly or indirectly, with Edel. As disclosed by the affidavit then furnished, which the Magistrate so required because of S & S' continuing denial of S & S' ownership and control of Edel at the relevant times in this action: since January 1981 (five[s] months before Edel's

19. At the pre-trial conference held on July 12, 1983, the District Court also directed that petitioners' compliance with the Magistrate's pre-trial discovery orders would not be deemed a waiver of, and would be without prejudice to petitioners' rights to seek arbitration of the matters in dispute.

representations to Masin previously stated), Edel has been 80% owned by Amro which, in turn, is 100% owned by C.A.M., which, in turn, is 100% owned by all three (3) Srybnik Brothers, at least two (2) of which, as partners, admittedly own S & S 100%. Compare McAllister Bros v. A. & S. Transportation Co., supra, 621 F.2d 519, where a 33-1/3% ownership alone was held sufficient to create a triable issue of fact under 9 U.S.C.A. §4 as to such owners' obligation to arbitrate pursuant to an arbitration agreement unsigned by it. Notwithstanding such disclosure as made in that affidavit, and incredible as it may seem, S & S also denied therein ownership and control of Edel, and again denied the latter (via its counsel) on the argument

of the Renewed Motion.

Even more incredibly, notwithstanding such disclosure as well as all of the other proofs before it totally attacking the predicates for its December 1982 Order, the District Court, without even awaiting S & S' response to that Court's directives on oral argument,[20] summarily denied petitioners' Renewed Motion, and even refused to consider

20. Both in its reply papers and during argument of the Renewed Motion, petitioners asserted that it was incredible that a partnership, as extensively engaged in international commerce as S & S demonstrably was, and is, would not refer to its own purchase orders in letters of credit opened by it covering those purchase orders, and would not also require acknowledgements of those purchase orders, if, in fact, as S & S contended, S & S had actually transmitted the disputed purchase orders to Masin. The District Court thus directed S & S during oral argument, to provide petitioner with the documents used by S & S to open its letters of credit covering this machinery. Such documents were not provided by S & S

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that motion on the merits, finding by its endorsed order of November 14, 1983 (the "November 1983 Order"), as a purported act of discretion on that Court's part under Fed. R. Civ. Proc. 60(b), that "[a]lthough this motion was made within a year of...[its] Order of December 7, 1982...the motion was not made within a reasonable time...[under Rule 60(b)]." Appendix at p. 6a (clarification added).

Perhaps, most incredible of all, given the evidence already in the record and the further evidence then discovered and pre-

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(cont'd) until after the District Court's denial of the Renewed Motion, under cover of a letter to petitioners' counsel dated November 22, 1983, which documents, moreover, were not represented to be all of the documents used by S & S to open said letters of credit, and further were merely duplicative of matter already in the record and in no way referred to S & S' disputed purchase orders.

sented to the Court on the eve of argument on petitioners' appeal from the November 1983 Order, the Court of Appeals, in an informal opinion dated April 6, 1984, affirmed the District Court's November 1983 Order, finding that "[o]n the record before...[it, the Court of Appeals] cannot say that Judge Knapp abused his discretion in finding that the Rule 60(b) motion was not brought 'within a reasonable time'." Appendix, at p. 4a (clarification added). The further evidence mentioned was obtained by petitioners from a further additional litigation to which petitioners are not parties, commenced in February 1984, in the U.S. District Court for the Eastern District of N.Y. (the "Eastern District Action") against, inter alia, Edel, S & S, the Srybnik Brothers, S & S (and also

Edel's) treasurer, S & S' general manager, and the 100% owned companies (Amro and C.A.M.) through which S & S' partners own 80% of Edel. In that action, N.J. Bank and a Louisiana judgment creditor of Edal, based on facts known to them arising out of their dealings with Edel, S & S and the Srybnik Brothers et al., seek to recover from said defendants judgments previously obtained in their favor against Edel in other litigations to which petitioners also were not parties, essentially on the ground that, since January 1981 when S & S' partners so acquired 80% ownership and control of Edel, Edel had become nothing more than a shell and alter ego of S & S and the Srybnik Brothers. On argument of petitioners' appeal on April 2, 1984, the Court of Appeals indicated that it

could not take into account such further evidence then obtained in connection with the Eastern District Action and presented to that Court under cover of petitioners' counsel's letter dated March 30, 1984, and that such evidence was properly a matter for the District Court to consider.

By letter dated March 30, 1984, petitioner's counsel had also submitted the evidence then obtained from the Eastern District Action to the District Court, and requested, based on such evidence and that already in the record attacking the predicates for that Court's December 1982 and November 1983 Orders, the District Court's reconsideration and vacatur, sua sponte, of those Orders and the issuance of an order either compelling arbitration of the matters in dis-

pute or, at least, directing a trial on the issues of S & S' obligation to arbitrate this matter.

By further letter dated June 13, 1984, petitioners' counsel again made the aforementioned request of the District Court, supported also by a copy therewith enclosed of S & S, the Srybnik Brothers', Edel's, Amro's and C.A.M.'s answer filed in the Eastern District Action, dated May 31, 1984, in which said defendants admit the Srybnik Brothers' ownership and control of S & S, Amro and C.A.M., and that S & S' treasurer had also been an officer (i.e., treasurer) and director of Edel, since January 1981 when the Srybnik Brothers acquired said 80% ownership, through Amro and C.A.M., of Edel. Such admission, it is respectfully submitted,

thus renders immaterial the disputed issue in this case as to whether or not S & S did, in fact, place the disputed S & S purchase orders which Masin has no record of its ever having received from S & S, because it establishes S & S' ownership, domination and control of Edel when, in May 1981, Edel represented to Masin that the machinery in this action would be covered by the Masin-Edel Contract containing the subject arbitration clause. It also destroys, suffice it to say, the fundamental predicate for the District Court's December 1982 Order, which the District Court refused to reconsider by its November 1983 Order on petitioners' Renewed Motion, vis, S & S' denial of its ownership and control of Edel when said representation was made by Edel in or-

der to avoid its (S & S') being bound by said representation.

Notwithstanding these requests made of the District Court by said letters dated March 30, 1984 and June 13, 1984, and the documentary evidence therewith submitted, the District Court, at a conference held on June 14, 1984, indicated that it would not reconsider its December 2, 1982 and November 14, 1983 Orders, sua sponte, and that, if petitioners so chose, they would have to file a formal motion requesting such relief.[21] Suffice it to say, however, that at such con-

21. Petitioners intend to and will file such motion as soon as Masin obtains the necessary visa (which has already been applied for) for one of its employees with knowledge of the facts to come to the U.S. from Romania for purposes of executing Masin's moving papers (which also have already been prepared).

ference, the District Court gave no indication that it was prepared to reconsider and vacate those Orders even if petitioners were to file such a motion. Indeed, and quite to the contrary, the District Court gave every indication at that conference that, if such a motion were to be filed and then denied, the District court was fully prepared to award S & S costs, including counsel fees, on that motion as well as on petitioners' Renewed Motion. The chilling effect of that indication by the District Court, in terms of petitioners' rights under the laws and treaties of the United States to enforcement of the subject arbitration agreement, is obvious, it is most respectfully submitted.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 17 states, in relevant part:

> 1. A review on writ of certiorari...will be granted only when there are special and important reasons therefor. The following indicate the character of reasons that will be considered.
> (a) When a federal court of appeals...has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
> * * *
> (c) When...a federal court of appeals... has decided a federal question in a way in conflict with applicable decisions of this Court.

As demonstrated by the foregoing statement of the case and as hereafter further established, the orders of both the

Court of Appeals and the District Court, denying petitioners' arbitration of the matters in dispute, so far depart from the accepted and usual course of judicial proceedings, and conflict also with the laws, treaties and international agreements of the U.S., the applicable decisions of this Court and even that same Federal Court of Appeals' own prior applicable decisions, as to call for the exercise by this Court of its power of supervision through the reversal of those orders.

I.

THE DISTRICT COURT ERRED IN DENYING PETITIONERS' RENEWED MOTION TO STAY THIS ACTION AND TO COMPEL ARBITRATION, AND IN FURTHER DENYING TO PETITIONERS AT LEAST EVEN A TRIAL TO DETERMINE THEIR ENTITLEMENT TO SUCH RELIEF.

Under the Convention, both the U.S. and Romania have agreed to:

> recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them... concerning a subject matter capable of resolution by arbitration.

Article II, 31. Further, both the U. S. and Romanis have agreed that the courts of either country:

> when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request

> of one of the parties, refer the parties to arbitration...

Article II, §3 See also, the Agreement on Trade Relations between the U. S. and Romania (the "Agreement"), T.I.A.S. 8159, which provides that:

> Nationals, firms, companies and economic organizations of either... [country] shall be afforded access to all courts and, when applicable, to administrative bodies as plaintiffs or defendants, or otherwise, in accordance with the laws in force in the territory of such other... [country].

Agreement, § 2 (clarification added)

Chapter 2 of the Federal Arbitration Act, which enforces The Convention in the U. S., further empowers a U. S. court, pursuant to The Convention, to "direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that

place is within or without the United States". 9 U.S.C.A. §206. See, In re Ferrara S.p.A., 441 F. Supp. 778 (S.D.N.Y. 1977), aff'd. mem. 580 F. 2d 1044 (2d Av. 1978), and Star-Kist Foods, Inc. v. Diakin Hope, S.A., 423 F. Supp. 1220 (C.D. Ca. 1976). See also, 9 U.S.C.A. §203.

As decreed by this Court, The Convention and the Federal Arbitration establish a strong Federal policy favoring the arbitration of international disputes such as this. See, The Bremen v. Zapata Off-Shore Co., supra, 407 U.S. 1; Scherk v. Alberto-Culver Co., supra, 417 U.S. 506; Gateway Cole Co. v. Mineworkers, supra, 414 U.S. 368; Becker Autoradio U.S.A. v. Becker Autoradio Werk GmbH, supra, 585 F. 2d 39; Hussey Met al Deivision v. Lectromelt Furnace Division,

supra, 471 F. 2d 556. The reason for such strong Federal policy, as stated by this Court in Scherk, quoting from its decision in The Bremen, 407 U.S. 1, at 9, is obvious:

> "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . We cannot have trade and commerce in world markets and international waters exclusively in our courts.
>
> For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act." 417 U.S. at 519-520.

Thus, any "doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court can state with 'positive assurance' that this dispute was not meant to be arbitrated". Hussey Metal Division v. Lectromelt Furnace Division, supra, 471 F. 2d at 558, quoting from this Court's decision in United Steel Workers of America v. Warrior and Gulf Navig. Co., 363 U.S. 574 at 582-583 (1960).

It is respectfully submitted that, given the facts of this case as before the District Court, such a positive assurance is impossible.

Significantly, even third (non-signing) parties may properly be held bound by written

arbitration agreements. See Morris v. Chesapeake & U.S.S. Co., supra, 125 F.2d 62, aff'd 148 F. 11, cert. den. 208 U.S. 592; Hartford Financial Systems v. Flordia Software Services, supra, 550 F. Supp. 1079, appeal dismissed 712 F.2d 724; In re Atlantic Shipping Corp. v. Cheswick Flanders & Co., supra, 463 F. Supp. 614; Interocean Shipping v. National Shipping & Trading, supra, 148 F.2d 625; McAllister Brothers v. A. & S. Transportation Co., supra, 621 F.2d 519 and Interbras Cayman Co. v. Orient Victory Shipping Co., s.a., supra, 663 F.2d 4.

Even assuming arguendo that the District Court had any reasonable doubt whatsoever as to the fact that S & S is bound by Edel's representation to arbitrate this matter in accordance with the Masin-Edel Contract, then, the

District should have granted petitioners at least an evidentiary hearing or trial to determine that threshold issue pursuant to 9 U.S.C.A. §4 as mandated by the Court of Appeals' decision in McAllister Brothers, Inc. v. A. & S. Transportation Co., supra. In McAllister, as well as in Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., supra, 663 F.2d 4; A/S Custodia v. Lessin International, Inc., supra, 503 F.2d 318, and Fisser v. International Bank, supra, 282 F.2d 231, 235, the Court of Appeals held that it is improper and, therefore, error to determine such a threshold issue on the basis of factually disputed papers. Significantly, in Interbras Cayman Co., supra, the Court of Appeals reversed this same District Court Judge for doing essentially the same thing done here, i.e., deciding there, on

factually disputed papers, that a third (non-signing) party is bound by a written arbitration agreement. See also, Great American Trading Co. v. I.C.P. Cocoa, Inc., supra, 629 F.2d 1282.

Moreover, once an agreement to arbitrate has been shown (i.e., the Masin-Edel Contract here), it is well-settled law in the Second Circuit that all defenses, such as, e.g., laches, waiver and statute of limitations, must be submitted to the arbitrators for determination. See In re Conticommodity Services Inc., 613 F.2d 1222 (2d Cir. 1980); World Brilliance Corp. v. Bethlehem Steel Co., 342 F.2d 362 (2d Cir. 1965); and Trafalgar Shipping Co. v. International Milling, 401 F.2d 568 (2d Cir. 1968). In denying petitioners' Renewed Motion as not having been made "within a reasonable time," relying on its discretion in connection with Rule 60(b) motions,

the District Court equated petitioners' inability to submit the evidence therewith presented as laches or as a waiver of their right to arbitration which defenses are thus for the I.C.C. to determine under the Masin-Edel Contract. See also, T & R Enterprises v. Continental Grain, 613 F.2d 1272 (5th Cir. 1980), and Hamilton Life Ins. v. Republic National Life Ins., 408 F.2d 606 (2d Cir. 1969), also holding that the issues of laches or waiver, in terms of the right to trial by jury mandated by 9 U.S.C.A. §4, are applicable to a party resisting arbitration, not to a party seeking it.

The District Court's November 1983 order thus totally disregarded petitioners' rights under The Convention, the Agreement and the Federal Arbitration Act, as well as under the applicable decisions of this Court and of the Court of Appeals also.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONERS' AFORE-MENTIONED RENEWED MOTION.

As broad as the discretion of a District Court may be in connection with a Rule 60(b) motion, that discretion, of course, is not unbridled. See Stridiron v. Stridiron, 698 F.2d 204 (3rd Cir. 1943); Dabney v. Montgomery Ward, 692 F.2d 49 (8th Cir. 1982), cert. den. 103 U.S. 2429 (1983), U.S. V. Walus, 616 F.2d 283 (7th Cir. 1980) and Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978). Such discretion, moreover, obviously does not entitle the District Court to disregard (as it did here) petitioners' rights under the Convention, the Agreement and the Federal

Arbitration Act, as well as under the applicable decisions of this Court and of the Court of Appeals itself. In countenancing such disregard of those rights by the District Court, as within the latter's discretion in connection with a Rule 60(b), the Court of Appeals thus erred.

CONCLUSION

This Court should review this case because the orders of both the Court of Appeals and the District Court so far depart from the accepted and usual course of judicial proceedings, and conflict also with the laws, treaties and international agreements of the U.S., the applicable decisions of this Court and even of that same Court of Appeals own prior applicable decisions, as to call for the exercise by this Court of its power of supervision through the reversal of those orders. For these reasons, it is re-

spectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE VINCENT KELLY

MALONEY & KELLY
Attorneys for Petitioners

APPENDIX

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 6, 1984

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of April, one thousand nine hundred and eighty-four.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE HENRY J. FRIENDLY,

HONORABLE JAMES L. OAKES,
Circuit Judges

S & S MACHINERY CO.,

Plaintiff-Appellee,

v.

MASINEXPORTIMPORT, a Romanian Corporation, and THE ROMANIAN BANK FOR FOREIGN TRADE,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Defendants Masinexportimport and the Romanian Bank for Foreign Trade ("Masin") appeal from an order of Judge Whitman Knapp dated November 14, 1983, denying their motion under Fed. R. Civ. P. 60(b). The underlying litigation arose out of the purchase by plaintiff-appellee S & S Machinery of machinery manufactured by Masin. In July 1982, S & S Machinery brought an action in New York Supreme Court, seeking damages for alleged breach of contract. It also obtained an attachment of Masin's property. Shortly thereafter, Masin removed the action to the United States District Court for the Southern District of New York. In a Memorandum & Order dated December 7, 1982, Judge

Knapp vacated the attachment, but denied Masin's motion to stay the action and to compel arbitration.

2. S & S Machinery then appealed from the portion of Judge Knapp's December 1982 order vacating the attachment, and in April 1983 we affirmed. S & S Machinery Co. v. Masinexportimport, 706 F.2d 411 (2d Cir.), cert. denied, 104 S. Ct. 161 (1983). Masin did not appeal from the portion of Judge Knapp's order denying its motion to stay the proceedings and to compel arbitration. In July 1983, Masin moved under Rule 60(b) for relief from that portion of the order. In his November 1983 order, Judge Knapp denied the motion.

3. Masin now appeals from that order, arguing that Judge Knapp abused his discretion in denying its Rule 60(b) motion. Denial of such a motion is ordinarily appealable and in this case neither party raised the appealability issue. Given the particular posture of the case, however, it is not absolutely clear whether the order before us is in fact appealable. However, we do not believe it necessary or appropriate to resolve the question of appealability because we believe that the appeal, in any event, clearly has no

merit. Thus, we assume *arguendo* that Judge Knapp's November 1983 order is appealable.

4. On the record before us, we cannot say that Judge Knapp abused his discretion in finding that the Rule 60(b) motion was not brought "within a reasonable time." In denying the motion, he concluded that

> we see no reason why, with the use of "due diligence" in communicating with their clients, counsel for defendants could not have "discovered" this "new evidence" well before this motion was made, almost a year and a half after this action was filed.

Indeed, it seems to us that much, if not all, of the evidence presented by Masin in its Rule 60(b) motion could have been discovered in time for Judge Knapp to consider it in his December 1982 order.

5. We have considered all of appellants' arguments and find them without merit.

6. The judgment of the district court is affirmed.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Henry J. Friendly
HENRY J. FRIENDLY

s/ James L. Oakes
JAMES L. OAKES,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ENDORSED ORDER OF KNAPP, U.S.D.J. DATED NOVEMBER 14, 1983 ON MASINEXPORTIMPORT'S MOTION TO REVIEW

Motion denied. Under Fed. R. Civ. Proc. 60(b), a motion for relief from an order on the grounds of newly discovered evidence must be made "within a reasonable time," which time may not exceed one year. Although this motion was made within a year of our Order of December 7, 1982, from which defendants seek relief, we see no reason why, with the use of "due diligence" in communicating with their clients, counsel for defendants could not have "discovered" this "new evidence" well before this motion was made, almost a year and a half after this action was filed. We therefore find that the motion was not made within a reasonable time, and deny it.

SO ORDERED.

s/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

Dated: New York, New York
November 14, 1983

MEMORANDUM AND ORDER OF KNAPP, U.S.D.J.
DATED DECEMBER 7, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

S&S MACHINERY CO.,

Plaintiff,

-against-

MEMORANDUM & ORDER

82 Civ. 4890 (WK)

MASINEXPORTIMPORT and THE ROMANIAN BANK FOR FOREIGN TRADE,

Defendant.

----------x

WHITMAN KNAPP, D.J.

Plaintiff, the purchaser of allegedly defective machinery, has brought this breach of contract action against Masinexportimport ("Masin"), the manufacturer of the machinery, and the Romanian Bank for Foreign Trade (the "Romanian Bank"), Masin's collection agent. The defendants have moved to vacate a

prejudgment attachment of letters of credit opened by plaintiff on Masin's behalf. Defendants have also moved to dismiss the action for lack of personal jurisdiction or, in the alternative, to stay the action and compel arbitration. For the reasons stated below, we deny the motion to dismiss the complaint against Masin, and refer the issue of personal jurisdiction over the Romanian Bank to the Honorable Ruth V. Washington, United States Magistrate. We further grant the motion to vacate the attachment. We deny the motion to stay the action and compel arbitration.

PERSONAL JURISDICTION

Both defendants have demonstrated to our satisfaction that they are "agencies or instrumentalities of a foreign state" under the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602

et seq., and thus subject to the FSIA's protections. The relevant definition is found in 28 U.S. (sic) §1603:

> (a) A "foreign state": --- includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as (defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity --
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of the United States... nor created under the laws of any third country.

It is undisputed that defendants fulfill criteria b(1) and b(3). As to b(2), defendants have supplied us with the

affidavit of Nicolae Sava, Consul of the Socialist Republic of Romania, stating that the Romanian Bank "is an organ of the Romanian Government" and that Masin "is a state foreign trade company wholly-owned and controlled by the Romanian Government." This is sufficient as to the Romanian Bank, as plaintiff appears to concede. While the statement with respect to Masin is somewhat conclusory, see Pan American Tankers Corp. v. Republic of Vietnam (S.D.N.Y. 1968) 291 F.Supp. 49, we are persuaded that it provides evidence of complete control by the Romanian Government. We note that the plaintiff has provided us with no evidence which would lead us to a contrary conclusion; and we further note that the affidavit of an official such as Mr. Sava is generally considered to be highly persuasive evidence of an entity's entitlement to immunity under the FSIA.

See Yessenin-Volpin v. Novosti Press Agency (S.D.N.Y. 1978) 443 F. Supp. 849, 854.

We turn, therefore, to the issue of service of process and personal jurisdiction. Service was properly effected on Masin under the requirements of 28 U.S.C. §1608(b)(2). This subsection provides that an agency or instrumentality of a foreign state may be served:

> by delivery of a copy of the summons and complaint... to any agent authorized by appointment or by law to receive service of process in the United States.

Among the numerous methods of service employed by plaintiff, a copy of the summons and complaint was served upon the New York Secretary of State, who is designated by New York Business Corporation Law §307 as the agent for service of any corporation otherwise subject to personal jurisdiction. Such further provision for jurisdiction is made by New York Civil

Practice Law and Rules §302(a)1. As amended in 1979, this subsection provides for personal jurisdiction over any person who "transacts any business within the state or contracts anywhere to supply goods or services in the state," in any cause of action arising from such acts. It is undisputed that the allegedly defective machinery on which the plaintiff's cause of action is based was shipped to plaintiff in New York f.o.b. Hamburg, Germany. We have been directed to no authority, nor have we discovered any, that creates an exception to the plain language of C.P.L.R. §302(a)1 simply because goods are not shipped f.o.b. New York.[1] Accordingly, we find that the cause of action against Masin arose from its transaction of business in New York, and thus that service upon the Secretary of State was sufficient as to it.

Plaintiff also urges that service on the Romanian Bank was properly effected under 28 U.S.C. §1608 by its delivery of a copy of the summons and complaint to the New York Superintendent of Baning (sic). We disagree.

New York Banking Law §207 provides that the Superintendent of Banking shall be deemed designated as an agent for service for any foreign banking corporation which does not have a license to transact banking business in New York but nevertheless

> transact[s] in this state the business of buying, selling, paying or collecting bills of exchange, or of issuing letters of credit or of receiving money for transmission or transmitting the same by draft, check, cable or otherwise, or of making loans, or of receiving deposits, or of exercising the fiduciary powers specified in section two hundred one-b of this chapter, or transacting any part of such business, or maintaining in this state any agency or branch for carrying on such business, or any part thereof. (Banking Law §200)

All parties agree as to the activities of the Romanian Bank with respect to this

action. Pursuant to the purchase agreements between plaintiff and Masin, plaintiff opened letters of credit on Masin's behalf with the Bankers Trust Company in New York. Payment to Masin was to be made in two installments. When the first payments came due, the Romanian Bank acted as Masin's collection agent; it now seeks to act in the same capacity to collect upon the remaining letters of credit to which Masin claims it is entitled. Since these payments have been made and will continue to be made by Bankers Trust to the Romanian Bank in Romania, we find that the Romanian Bank has not transacted, and will not transact, any banking business in New York.

In addition, we find that the Romanian Bank's activities, wherever transacted, do not rise to the level of the transaction of the business of any of the banking functions listed in Banking Law §200. Although the Romanian Bank did transmit payment to Masin, it did so as part of a

single, two-step transaction rather than as a regular business activity. The New York Supreme Court has held that Banking Law §200 is not implicated in a case involving "a single isolated transaction by a foreign bank, accepting no deposits from local customers, but rather, as a designated escrowee, ...not regularly 'doing business here' [but acting] merely as a conduit in forwarding funds on deposit with [a New York bank] to the rightful recipients once the conditions of the escrow have been met." Animalfeeds International, Inc. v. Banco Espirito Santo e Commercial de Lisboa (S.Ct. 1979) 420 N.Y.S.2d 954, 959. We see no reason why this should not be equally true for a foreign bank acting solely as a conduit for the collection of funds. We find that the Romanian Bank has engaged in none of the activities which would constitute an appointment of an agent for service of process under New York Banking law.

Plaintiff further claims that service was properly made on defendants under the provision of 28 U.S.C. §1608(b)(2) which permits service upon an agency or instrumentality of a foreign state by service on "any...agent authorized by appointment," and under §1608(b)(1), which provides that services may be made "in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality." Defendants deny that any such arrangements existed and that the various individuals who were admittedly served were appointed agents for this purpose.

We defer judgment on this issue and refer this case to the Honorable Ruth V. Washington, United States Magistrate, to hear and report to us on what, if any, agents were appointed or arrangments for service were made with plaintiff by the Romanian Bank or anyone with authority to take such acts on its behalf.

ATTACHMENT OF DEFENDANTS' PROPERTY

We turn now to the substantive issues presented in defendants' motions. Defendants claim that the attachment of certain letters of credit which, it is undisputed, were their property at the time the attachment was granted, is invalid under the FSIA. We agree.

28 U.S.C. §1609 provides that, with certain exceptions, "the property in the United States of a foreign state shall be immune from attachment arrest and execution." At oral argument plaintiff for the first time raised the claim that one of these exceptions is relevant to this case. 28 U.S.C. §1610(d) provides that there shall be no §1609 immunity if:

> (1) the foreign state has explicitly waived its immunity from the attachment prior to judgment, notwithstanding any withdrawal of the waiver of the foreign state may purport to effect except in accordance with the terms of the waiver, and
>
> (2) the purpose of the attachment is to secure satisfaction of a judgment that

> has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

Plaintiff claims that Article IV, Section 2 of the Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania (the "Agreement") constitutes an explicit waiver of immunity.[2] The Section provides:

> Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts and, when applicable, to administrative bodies and plaintiffs or defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial transactions... (Emphasis supplied.)

Since we are unable to discover any cases concerning this Section of the Agreement, we accept the invitation of both parties to apply the case law concerning a strikingly similar section of the Treaty of

Amity between the United States and Iran.[3] The Second Circuit has very recently held that "the weight of authority is that this provision -- and in particular the phrase "other liability" -- is not an explict waiver of immunity from prejudgment attachment. Libra Bank, Ltd. v. Bank of Costa Rica (2d Cir. 1982) 676 F.2d 47,50.[4] Since Libra Bank is, to our knowledge, the only case in this Circuit which has directly approached this issue, we have no hesitancy in following its holding and applying it to the instant case. We thus hold that there has been no explicit waiver of defendants' immunity from prejudgment attachment under the FSIA, and thus that the attachment of its property is invalid and must be vacated.

We likewise hold that we may not issue an injunction prohibiting the Bankers Trust Company from releasing to defendants, and defendants from collecting, the letters of credit in their favor. While 28 U.S.C. §

1609 does not specifically grant immunity from injunctions, the result of such an injunction in this case would for all intents and purposes be precisely the same as that of a prejudgment attachment. There is thus only an illusory, not a real, different between the remedies here. See Behring International, Inc. v. Imperial Iranian Air Force (D.N.J. 1979) 475 F.Supp. 383 (temporary restraining order enjoining defendant, an agency or instrumentality of a foreign state, from disposing freely of its assets in the United States, discussed as a prejudgment attachment under the FSIA). We will not eviscerate the FSIA by permitting under one name the precise thing which is expressly forbidden under another.

ARBITRATION

We turn, finally, to defendants' assertion that plaintiff is bound by an agreement to arbitrate any disputes arising

from the contract between plaintiff and Masin, and thus that this action should be stayed pending such arbitration. We find that no such agreement existed between the parties and thus refuse to stay these proceedings.

Defendants claim, first, that plaintiff is bound by an arbitration clause contained in the contract of Masin with another company not party to this action, American Edelstaal ("Edelstaal"). However, we find that plaintiff did not become Edelstaal's assignee or assume this particular contractual obligation when it agreed to purchase from Masin the machinery which Edelstaal found itself unable to pay for. The facts and documents presented to us indicate that plaintiff contracted anew to buy certain merchandise indentified as that previously contracted for by Edelstaal. While plaintiff made its purchases at Edelstaal's request, the fact that plaintiff then resold the machinery to

others as well as to Edelstaal demonstrates that the Edelstaal-Masin contract was fundamentally altered and not merely completed through a middleman.

Defendants rely heavily on the fact that the bills of sale for 134 of 138 shipments from Masin to plaintiff were marked "as per American Edelstaal p.o." We interpret this as no more than an identification of the goods to be purchased. We also refuse to draw any inferences from the fact that Masin made the same boilerplate guarantee of quality to both plaintiff and Edelstaal.[5] Defendants' comparison of the instant case to Midland Tar Distilleries, Inc. v. M/T Lotos (S.D.N.Y. 1973) 362 F.Supp. 1311, 1312-1313, is unfounded. In that case, an earlier contract was held to be incorporated into the contract at issue by the words "subject to all the terms, liberties and conditions of the [the

charter party]." The instant case does not rise near to this level of incorporation.

We also reject defendants' contention that an arbitration provision appearing on two of Masin's acknowledgements of plaintiff's orders constitutes a course of conduct establishing that the parties had agreed to arbitrate all disputes.[6] The New York Court of Appeals has held that where an order form contains no reference to arbitration but an acknowledgement does include such a provision,

> the inclusion of an arbitration agreement materially alters a contract for the sale of goods and thus, pursuant to section 2-207 (subd. [2], par. [b]) [of the Uniform Commercial Code], it will not become a part of such a contract unless both parties explicitly agree to it. Matter of Marlene Indus. Corp. (Carnac), 408 N.Y.S. 2d 410, 413 (1978).

And in Schubtex, Inc. v. Allen Snyder, Inc., that court, after discussing Marlene, held that no such explicit agreement could be inferred from a "prior course of dealing" which consisted of two written

confirmations, containing arbitration provisions, of order forms which did not provide for arbitration. 424 N.Y.S.2d 133, 135 (1979). We find this case to be indistinguishable from Schubtex. We hold that no arbitration agreement existed at any time between the parties, and thus refuse to stay the instant motion.

SO ORDERED.

Dated: New York, New York
December 7, 1982

WHITMAN KNAPP, U.S.D.J.

1 We note that the cases cited by defendants for the proposition that merely shipping goods into New York does not constitute sufficient contact with the state to provide personal jurisdiction, predate the 1979 amendment to the C.P.L.R. which plainly provides to the contrary.

2 In the instant case it is undisputed that the letters of credit which are the subject of the attachment are the property of Masin and are used for a commercial activity in the United States, and that the attachment was not sought for the purpose of obtaining jurisdiction over the defendants.

3 The relevant provision of the Treaty of Amity between the United States and Iran provides:

> No enterprise of either [country]...shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

4 See, Security Pacific National Bank v. Iran (C.D.Cal. 1981) 513 F.Supp. 864, 879-80; New England Merchants National Bank v. Iran Power Generation & Transmission Co. (S.D.N.Y. 1980) 502 F.Supp. 120, 126-27, remanded (2d Cir. 1981 646 F.2d 779; E-Systems, Inc. v. Islamic Republic of Iran (N.D.Tex. 1980) 491 F.Supp. 1294, 1301-02; Reading & Bates Corp. v. National Iranian Oil Co. (S.D.N.Y. 1979) 478 F.Supp. 724, 728; Behring International, Inc. v. Imperial Iranian Air Force (D.N.J. 1979) 475 F.Supp. 383, 392-3. Contra, Reading & Bates Drilling Co. v. National Iranian Oil Co. (S.D.N.Y. Nov. 29, 1979) No. 79 Civ. 6034 (Bench ruling); Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran (S.D.N.Y. May 23, 1979) No. 79 Civ. 1711 (Bench ruling), remanded (2d Cir. 1979) 610 F.2d 94.

5 We further reject defendants' claim that plaintiff has relied on Edelstaal's contract in asserting a breach of this guarantee, and is thus bound by the arbitration provision of that contract. Although the guarantee that the goods in question would be "manufactured first class" does not appear in any of the correspondence or written agreements between Masin and plaintiff, it appears from plaintiff's verified complaint and other papers that it has based its cause of action on oral representations made to it, and not on any part of Edelstaal's contract.

6 We note, incidentally, that one of these notations refers to arbitration in Romania, whereas the arbitration agreements between defendants and Edelstaal, to which defendants claim plaintiff is bound, mandate arbitration in France.

ORDER OF DISTRICT COURT DATED JULY 27, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 0057

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In the matter of the Arbitration between

MASINEXPORTIMPORT,

Petitioner,

-against-

AMERICAN EDELSTALL, INC.,

Respondent.

----------x

APPEARANCES

Attorney for Petitioner

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OWEN, District Judge

This action was commenced by petitioner, Masinexportimport ("Masin"), by the filing of a document styled "Petition to Compel Arbitration; To Vacate Attachment; and For Related Relief." In that document, petitioner prayed for various forms of relief including, but not limited to, the stay of an action in the New Jersey Superior Court captioned American Edelstaal, Inc. v. First National State Bank of New Jersey, et al., (Dkt. #C-583-81E), and the removal of that action to the

Southern District of New York. This action comes before me today on petitioner's application for the aforesaid relief and on the cross-motion of respondent, American Edelstaal, Inc. ("Edel") (to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure.) For the reasons set forth below, petitioner's application is denied and respondent's motion to dismiss is granted.

This controversy arises out of two contracts entered into in 1977. Pursuant to 9 U.S.C. §202, these contracts are subject to the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The Convention").[1] By the first, Edel con-

---

1. §202 states:

An arbitration agreement or arbitral

cont'd

tracted to purchase certain equipment from Masin and by the second, Masin contracted to service such equipment. As part of its obligations pursuant to these contracts, Edel executed certain irrevocable letters of credit with the First National State Bank of New Jersey ("First National"), a party to the aforementioned New Jersey Superior Court action but not a party in today's dispute. The sales and service contracts between Masin and Edel

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cont'd

> award arising out of a legal relationship, whether contractual or not, which is considered as commercial ... falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

also contained certain arbitration clauses. I express no opinion on the mandatory or permissive nature of these clauses.

A dispute arising between Masin and Edel over the terms and performance of their contracts, Edel filed suit in New Jersey Superior Court on October 15, 1981 alleging certain claims for relief under state contract law. Edel also named First National as a party defendant in that action and sought and obtained an order of attachment on the letters of credit held by First National pursuant to the Masin-Edel contracts. The issues raised by Masin in its petition to this Court arise from the same nucleus of facts as the New Jersey action and certainly could have been asserted as a defense in that action.

It appears that Masin did not contest that New Jersey action, did not file an answer or seek removal pursuant to 9 U.S.C. §205, and allowed a default judgment to be entered against it on January 7, 1982.

Against this background, the issues before me today appear to reduce to one. Edel asserts that, pursuant to 9 U.S.C. §205, Masin has brought suit in the wrong federal forum. That statute states

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant ... may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the dis- and division embracing the place where the action or proceeding is pending. (emphasis added)

See Polizzi v. Cowles Magazine, 345 U.S. 643 (1952) (construing the analogous federal removal cases to the district and division mandated by statute rather than the forum where venue would normally lie.) I agree with respondent and find that petitioner should litigate the claims it has brought before me today either in the New Jersey court where Edel filed suit or in the appropriate federal district court following removal pursuant to 9 U.S.C. §205. I am therefore constrained to dismiss petitioner's application for lack of venue pursuant to Rule 12(b)(3).

So ordered.

s/
United States District Judge

Dated: July 27, 1982
New York, N.Y.

STATUTORY AND TREATY PROVISIONS

9 U.S.C.A. §201.

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

9 U.S.C.A. §202.

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has

> some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C.A. §203.

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C.A. §205.

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under

the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C.A. §206.

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that

place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

9 U.S.C.A. §208.

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C.A. §2.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist

at law or in equity for the revocation of any contract.

9 U.S.C.A. §4.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties

to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there

is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CONVENTION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

* * *

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

* * *

AGREEMENT

Article IV

Business Facilitation

* * *

2. Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts and, when applicable, to administrative bodies as plaintiffs or defendants, or otherwise, in accordance with the laws in force in the territory of such other Party.***

* * *

4. Firms, companies and economic organizations of either party that desire to establish representations or already operate representations in the territory of the other Party shall receive treatment no less favorable than that accorded to firms, companies and economic organizations of any third country in all matters relating thereto ***.

* * *

9. Each party agrees to provide its good offices to assist in the solution of business facilitation problems and in gaining access to appropriate government officials in each country.

* * *

11. Each Party agrees to facilitate in its territory to the fullest extent practicable, the activities of firms, companies and economic organizations of the other Party acting through employees, technicians, experts, specialists and other representatives in carrying out contracts concluded between the firms, companies and economic organizations of the two parties.

* * *

Fed.R. Civ. P. 60(b):

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.
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> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made with-

in a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)